BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY BARNES	)	
Claimant	)	
	)	
VS.	)	
	)	
GALAMET	)	
Respondent	)	Docket No. **1,022,469**
	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 21, 2008 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on June 10, 2008.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for the claimant. Andrew D. Wimmer of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered accidental injury arising out of and in the course of his employment with respondent on October 11, 2004. The issues litigated at regular hearing before the Administrative Law Judge (ALJ) were the nature and extent of claimant's disability and whether the erectile dysfunction claimant suffers was caused by the work-related accident.

The ALJ found claimant sustained a 41.5 percent work disability based upon an average of the 14.4 percent wage loss and the 68.6 percent task loss. The ALJ further

determined claimant's erectile dysfunction was caused by the work-related accident and authorized Dr. Kevin McDonald to provide claimant treatment for that condition.

The respondent requests review of the following: (1) nature and extent of disability; and, (2) whether claimant's alleged erectile dysfunction condition is related to his occupational injury. Respondent argues claimant should be limited to his functional impairment because he did not demonstrate a good faith effort in retaining accommodated employment with respondent. Respondent further argues claimant has not sustained his burden of proof that his erectile dysfunction is related to the work injury.

Claimant argues he is entitled to an underpayment of $32.19 in temporary total disability benefits because claimant's average weekly wage increased due to the June 15, 2005 discontinuance of the $1.19 per week fringe benefit. Claimant further argues the work disability calculation should be based upon a 22 percent wage loss until November 30, 2007. Claimant requests the Board to affirm the ALJ's Award in all other respects.

The issues for Board determination are the nature and extent of claimant's disability, specifically, whether claimant is entitled to a work disability and whether claimant met his burden of proof to establish that his erectile dysfunction is causally related to the work-related accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those fact findings herein. The Board adopts the ALJ's fact findings as its own as if specifically set forth herein except as hereinafter noted.

The claimant suffered injuries on October 11, 2004, when he was struck by a high tension wire that broke. Claimant complained of neck, left arm and mid-back pain. Claimant was provided treatment and ultimately surgery consisting of a fusion at L5-S1 was performed by Dr. Douglas C. Burton on claimant's back on August 17, 2005.

In a post-surgery office visit with Dr. Burton on November 29, 2005, claimant reported that he had experienced erectile dysfunction and had been unable to obtain an erection since the date of his accident. Claimant testified that he had never experienced

any problems with sexual function or difficulty obtaining an erection before his work-related accident. Dr. Burton referred claimant for a urological consult.

Dr. Kevin McDonald, board certified urologist, examined and evaluated claimant on January 3, 2006, for his complaints of erectile dysfunction. The doctor diagnosed claimant as having continuing erectile dysfunction and possible hypogonadism which was described as low testosterone. Dr. McDonald prescribed Androgel for the low testosterone but that did not alleviate claimant's problem. Dr. McDonald then prescribed Viagra which also did not alleviate claimant's erectile dysfunction. Dr. McDonald also tried penile injections of Alprostadil. Injection of the drug should provide a spontaneous erection but that also proved unsuccessful for claimant. It is significant to note the doctor agreed that the failure to achieve an erection after the penile injection more probably than not establishes that claimant's erectile dysfunction is physiological rather than a psychological problem.

Dr. McDonald concluded that claimant's erectile dysfunction was caused by the work-related accident. The doctor opined that as a result of the accident the claimant suffered some injury to the nerves that exit the low spinal cord and/or possible vascular disruption of some vessels which in turn caused claimant's erectile dysfunction.

Dr. Burton had referred claimant to Dr. McDonald and simply agreed that he would defer to Dr. McDonald or a urologist regarding whether the work-related accident caused claimant's erectile dysfunction. Dr. Edward Prostic likewise deferred to the urologist as to whether claimant's erectile dysfunction was caused by his work-related accident.

Dr. Michael A. Well performed a court-ordered physical examination of the claimant on April 24, 2007. In his report, the doctor concluded that he could not state with any assurance that claimant's erectile dysfunction was related to his accidental injury although it was possible. The doctor noted that erectile dysfunction has multiple causes and with regard to claimant the doctor suspected more than one issue as the cause, such as possibly injury related, cigarette smoking, past alcohol consumption, obesity and elevated cholesterol.

It should be noted that the other possible causes for erectile dysfunction that were discussed by the doctors cause a progressive gradual onset of erectile dysfunction. In this case, claimant testified that he had no problems until after the accidental injury. Claimant's spouse corroborated that testimony. Dr. McDonald opined that the accidental injury caused the erectile dysfunction. The Board affirms the ALJ's determination that the accidental injury caused claimant's erectile dysfunction.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at his attorney's request. On October 24, 2006, Dr. Prostic took a history from claimant and performed a physical examination. Claimant has undergone successful low

back surgery but continues to have neck and shoulder complaints. The doctor opined the claimant's physical examination was consistent with his complaints of pain as well as the mechanism of his work-related injury. Dr. Prostic diagnosed claimant as having arthrodesis posterolaterally at L4-5 with L4 appearing to be the last functional lumbar segment. The doctor recommended anti-inflammatory medicines and shoulder strengthening exercises for his neck and shoulder symptoms.

Based upon the AMA *Guides*[1], Dr. Prostic opined claimant has a 20 percent permanent partial whole body impairment due to his lumbar spine and 7 percent whole body impairment for the neck and shoulder. Using the combined values chart, these two impairments result in a 26 percent permanent partial impairment to the body as a whole. If the loss of sexual function is injury related, claimant would have an additional 20 percent permanent partial impairment to the body as a whole. The whole body impairments would combine for a 40 percent. Dr. Prostic opined claimant was capable of performing medium-level employment. The doctor placed restrictions on claimant of no lifting greater than 40 pounds occasionally and 20 pounds frequently; no use of vibrating equipment and that he change positions frequently.

Dr. Doug C. Burton, board certified orthopedic surgeon, first examined claimant on May 12, 2005. Dr. Burton took a history from the claimant, reviewed medical reports and performed a physical examination. The doctor diagnosed claimant as having a herniated disk with left leg pain and recommended surgery. Dr. Burton performed surgery on claimant's back on August 17, 2005.

Dr. Burton determined claimant had reached maximum medical improvement on April 8, 2006, and placed permanent restrictions on claimant of no lifting greater than 50 pounds occasionally, 25 pounds frequently and 10 pounds constantly. Based on the AMA *Guides*, the doctor rated claimant as having a 20 percent whole body functional impairment.

Both Drs. Prostic and Burton opined that claimant suffered a 20 percent permanent partial functional impairment to his lumbar spine. Dr. Burton only provided treatment and a rating for claimant's lumbar spine. From the outset after his injury claimant had complained of neck and shoulder pain and Dr. Prostic rated for those conditions as well as for the loss of sexual function. Consequently, the Board adopts Dr. Prostic's 40 percent permanent partial whole person functional impairment as he addressed all of claimant's injuries.

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The ALJ noted that claimant suffered permanent impairment to his shoulder and consequently entered a separate award for a scheduled disability to the shoulder. In *Bryant*,[2] the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Because claimant sustained injuries to his back and neck, as well as erectile dysfunction, which are nonscheduled injuries, all of his injuries, both scheduled and nonscheduled, are to be combined and compensated as a permanent partial disability under K.S.A. 44-510e. As previously noted, Dr. Prostic opined that all of claimant's injuries combined for a 40 percent whole person functional impairment. Consequently, the Board reverses the ALJ's finding that claimant is entitled to a separate award for a scheduled disability to the shoulder.

Respondent next argues that claimant is limited to his functional impairment because he did not make a good faith effort to retain accommodated employment that paid 90 percent or more than his pre-injury average weekly wage. Conversely, claimant argues that he made a good faith effort to retain the accommodated job but in any event shortly after his termination the respondent closed its business and could not have continued to provide accommodated work.

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[2] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[5] where the accommodated job violates the worker's medical restrictions,[6] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[7] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

In this case as the claimant was receiving medical treatment following his accidental injury he was provided temporary restrictions. Respondent provided claimant light-duty work in a different section of their business. While performing that light-duty work claimant allegedly confronted and threatened a customer. The customer, Mr. Garcia, testified that the claimant threatened to physically harm him and the claimant testified that he did not threaten Mr. Garcia. The ALJ analyzed the evidence in pertinent part:

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[6] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[7] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

> The Court, like Mr. McGinnis, does not find Mr. Garcia to be a credible witness. He testified that just before his deposition he was again threatened by the claimant, but the evidence is that when the claimant encountered Mr. Garcia and the respondent attorney he said nothing and only gave "just a little huff." Clearly, Mr. Garcia likes to over-dramatize matters. Given Mr. McGinnis' distrust of Mr. Garcia, and the lack of any corroborating evidence, the Court finds the claimant did not threaten Mr. Garcia, he was not terminated for misconduct, but due to the implied threat of Mr. Garcia that the respondent would lose business.[8]

The ALJ further noted that claimant's termination did not establish a lack of good faith on his part and that it was irrelevant whether respondent could have offered accommodated employment although the evidence was that respondent's business had ceased operation. The Board agrees and affirms. Consequently, the claimant is entitled to a work disability analysis.

After his release from medical treatment on April 8, 2006, the claimant received unemployment compensation as he conducted a job search. Claimant testified that he made between 10 to 15 applications for employment each week. Claimant finally obtained employment and worked for Labor Max, a temporary agency, from December 16, 2006 through March 2, 2007. He testified his average weekly wage was $172.99. After a new job search claimant became employed with Heartland Coffee Packaging Co. on July 14, 2007. He worked 40 hours a week earning $10 an hour and on December 1, 2007 he began earning $11 an hour. The evidence establishes that claimant made a good faith job search and the wage loss portion of the work disability formula will be based upon his actual wages.

Bud Langston, vocational rehabilitation consultant, conducted a personal interview with claimant in December 2006, at the request of his attorney. He prepared a task list of 34 nonduplicative tasks claimant performed in the 15-year period before his injury. Mr. Langston opined claimant is no longer able to perform heavy manual labor due to his injury and restrictions and therefore is restricted to entry-level jobs with medium exertion level or below. These jobs would pay $7-8 an hour.

Terry Cordray, vocational rehabilitation counselor, conducted a personal interview with claimant on June 13, 2006, at the request of respondent's attorney. He prepared a task list of 25 nonduplicative tasks claimant performed in the 15-year period before his injury in October 2004. At the time of the interview, claimant was unemployed and applying for jobs.

[8] ALJ Award (Mar. 21, 2008) at 3.

Dr. Burton reviewed the list of claimant's former work tasks prepared by Mr. Cordray and concluded claimant could no longer perform 12 of the 25 tasks for a 48 percent task loss. Dr. Burton reviewed the list of claimant's former work tasks prepared by Mr. Langston and concluded claimant could no longer perform 23 of the 34 tasks for an 68 percent task loss.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Cordray and concluded claimant could no longer perform 12 of the 25 tasks for a 48 percent task loss. Dr. Prostic reviewed the list of claimant's former work tasks prepared by Mr. Langston and concluded claimant could no longer perform 31 of the 34 tasks for a 91 percent task loss.

As both doctors' restrictions were similar and addressed claimant's back condition, the Board finds no compelling reason to give greater weight to either task loss opinion or either task list. Accordingly, the opinions are averaged to find claimant has suffered a 64 percent task loss.

Because claimant made a good faith effort to find employment the wage loss component of the work disability formula will be based upon his actual wages.[9] Accordingly, from April 8, 2006, through December 15, 2006, claimant suffered a 100 percent wage loss. From December 16, 2006, through March 2, 2007, claimant suffered a 66 percent wage loss. From March 3, 2007, through July 13, 2007, claimant suffered a 100 percent wage loss. From July 14, 2007, through November 30, 2007, claimant suffered a 22 percent wage loss. And after December 1, 2007, claimant suffered a 14 percent wage loss.

Because the wage loss portion of the work disability formula changes several times, as claimant's wage loss changed, the percentage of work disability varies. Simply stated, after every change in the percentage of disability, a new calculation is required to determine if there are additional disability weeks payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability. This calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

But the amount of benefit does not change whether the benefits are for work disability or functional impairment, instead when the injured worker's status changes due

[9] *See, Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

to changes in the work disability percentage or from work disability to functional impairment the only change under the current statute is the length of time the employee is entitled to receive benefits. As noted the claimant's work disability changes several times but due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due, therefore, this award simply uses the final percentage of permanent partial general disability to compute the total number of weeks of permanent partial disability compensation.

After December 1, 2007, the claimant's work disability decreases to 39 percent[10] which is less than his 40 percent functional impairment. Because the extent of permanent partial general disability cannot be less than the percentage of functional impairment the last calculation must be based upon claimant's functional impairment.[11]

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 21, 2008, is modified to reflect that claimant suffered a 40 percent whole person functional impairment and modified to reflect claimant suffered a 64 percent task loss. The Award is further modified to reflect an increase in the temporary total disability compensation rate after discontinuance of the fringe benefits. The ALJ's separate award for a scheduled disability to the shoulder is reversed.

Claimant is entitled to 35.29 weeks of temporary total disability compensation at the rate of $341.72 per week or $12,059.30 followed by 40.71 weeks of temporary total disability compensation at the rate of $342.52 per week or $13,943.99 followed by 1.71 weeks of permanent partial disability compensation from March 27, 2006 through April 7, 2006, at the rate of $342.52 per week or $585.71 for a 40 percent functional disability followed by 36 weeks of permanent partial disability compensation from April 8, 2006 through December 15, 2006, at the rate of $342.52 per week or $12,330.72 for an 82 percent work disability followed by 11 weeks of permanent partial disability compensation from December 16, 2006 through March 2, 2007, at the rate of $342.52 per week or $3,767.72 for a 65 percent work disability followed by 19 weeks of permanent partial disability compensation from March 3, 2007 through July 13, 2007, at the rate of $342.52 per week or $6,507.88 for an 82 percent work disability followed by 20 weeks of permanent partial disability compensation from July 14, 2007 through November 30, 2007, at the rate of $342.52 per week or $6,850.40 for a 43 percent work disability followed by 53.89 weeks of permanent partial disability compensation beginning December 1, 2007, for a 40 percent

[10] The 14 percent wage loss and the 64 percent task loss equals a 39 percent work disability.

[11] See K.S.A. 44-510e(a).

functional disability, at the rate of $342.52 or $18,458.40, making a total award of $74,504.12.

As of August 22, 2008, there would be due and owing to the claimant 35.29 weeks of temporary total disability compensation at the rate of $341.72 per week in the sum of $12,059.30 plus 40.71 weeks of temporary total disability compensation at the rate of $342.52 per week in the sum of $13,943.99 plus 125.57 weeks of permanent partial disability compensation at the rate of $342.52 per week in the sum of $43,010.23 for a total due and owing of $69,013.52, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $5,490.60 shall be paid at the rate of $342.52 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of August 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and its determination that claimant is entitled to a work disability. However, we disagree with the majority's conclusion that the claimant's percentage of functional impairment for his scheduled injury to his shoulder should be combined with his percentage of functional impairment for his general body injury to his back, neck and erectile dysfunction for a single permanent partial disability award based upon the total of all his impairments. We read *Casco* to require the scheduled injury to be compensated separately.

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> . . .
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> K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[12]

Because the shoulder is contained within the schedule of K.S.A. 44-510d(a), claimant's disability to that extremity must be compensated according to the schedule at the 225 week level. The back, neck and erectile dysfunction, however, are not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

All of claimant's injuries occurred as a direct result of a work-related accident. Nevertheless, claimant's shoulder injury is contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent disability resulting from his shoulder injury is compensable as a separate scheduled injury based upon his percentage of functional impairment for that injury alone.

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Administrative Law Judge

[12] *Casco*, Syl. ¶¶ 7, 10.